

Nov 30, 2017

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JUSTIN JAMES BAUGH,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 2:16-CV-00342-JTR

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT are cross-motions for summary judgment. ECF Nos. 15, 19. Attorney Dana C. Madsen represents Justin James Baugh (Plaintiff); Special Assistant United States Attorney Daphne Banay represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 6. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS, in part,** Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

JURISDICTION

Plaintiff filed applications for Supplemental Security Income (SSI) and Disability Insurance Benefits (DIB) on September 5, 2012, Tr. 174, alleging

1 disability since June 30, 2010, Tr. 154-61, due to mental health issues, acid reflux,
2 and anxiety. Tr. 177. The applications were denied initially and upon
3 reconsideration. Tr. 104-10, 113-19. Administrative Law Judge (ALJ) Moira
4 Ausems held a hearing on February 3, 2015 and heard testimony from Plaintiff and
5 vocational expert, Diane Kramer. Tr. 42-72. The ALJ issued an unfavorable
6 decision on May 4, 2015. Tr. 20-31. The Appeals Council denied review on
7 August 3, 2016. Tr. 1-6. The ALJ's May 4, 2015 decision became the final
8 decision of the Commissioner, which is appealable to the district court pursuant to
9 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review on September 30,
10 2016. ECF Nos. 1, 4.

11 **STATEMENT OF FACTS**

12 The facts of the case are set forth in the administrative hearing transcript, the
13 ALJ's decision, and the briefs of the parties. They are only briefly summarized
14 here.

15 Plaintiff was 36 years old at the alleged date of onset. Tr. 154. He
16 completed the twelfth grade in 1993, Tr. 178, and completed one quarter of
17 community college, Tr. 55. His reported work history includes the positions of
18 general laborer and dishwasher. Tr. 48-50, 178. At filing, Plaintiff reported that
19 he stopped working in May of 2012 due to his conditions. Tr. 177. However, at
20 the hearing, Plaintiff testified that his work in 2012 was actually a work assessment
21 arranged by the Division of Vocational Rehabilitation and, that following the
22 assessment, he withdrew from the program. Tr. 47-48. Prior to the 2012 work
23 assessment, Plaintiff was engaged in temporary work in 2010. Tr. 48-49.

24 **STANDARD OF REVIEW**

25 The ALJ is responsible for determining credibility, resolving conflicts in
26 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
27 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,
28 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d

1 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is
2 not supported by substantial evidence or if it is based on legal error. *Tackett v.*
3 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as
4 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put
5 another way, substantial evidence is such relevant evidence as a reasonable mind
6 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402
7 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational
8 interpretation, the court may not substitute its judgment for that of the ALJ.
9 *Tackett*, 180 F.3d at 1097. If substantial evidence supports the administrative
10 findings, or if conflicting evidence supports a finding of either disability or non-
11 disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d
12 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision supported by
13 substantial evidence will be set aside if the proper legal standards were not applied
14 in weighing the evidence and making the decision. *Browner v. Secretary of Health*
15 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

16 **SEQUENTIAL EVALUATION PROCESS**

17 The Commissioner has established a five-step sequential evaluation process
18 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),
19 416.920(a); *see Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one
20 through four, the burden of proof rests upon the claimant to establish a prima facie
21 case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-1099. This
22 burden is met once the claimant establishes that physical or mental impairments
23 prevent him from engaging in his previous occupations. 20 C.F.R. §§
24 404.1520(a)(4), 416.920(a)(4). If the claimant cannot do his past relevant work,
25 the ALJ proceeds to step five, and the burden shifts to the Commissioner to show
26 that (1) the claimant can make an adjustment to other work, and (2) specific jobs
27 exist in the national economy which the claimant can perform. *Batson v. Comm'r*
28 *of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-1194 (9th Cir. 2004). If the claimant

1 cannot make an adjustment to other work in the national economy, a finding of
2 “disabled” is made. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

3 **ADMINISTRATIVE DECISION**

4 On May 4, 2015, the ALJ issued a decision finding Plaintiff was not disabled
5 as defined in the Social Security Act.

6 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
7 activity since June 30, 2010, the alleged date of onset. Tr. 22.

8 At step two, the ALJ determined Plaintiff had the following severe
9 impairments: major depressive disorder; panic disorder with agoraphobia;
10 generalized anxiety disorder; methamphetamine, benzodiazepine, and alcohol
11 dependence in reported remission; tachycardia; hypothyroidism; obesity; and left
12 carpal tunnel syndrome. Tr. 22.

13 At step three, the ALJ found Plaintiff did not have an impairment or
14 combination of impairments that met or medically equaled the severity of one of
15 the listed impairments. Tr. 23.

16 At step four, the ALJ assessed Plaintiff’s residual function capacity and
17 determined he could perform a range of light work with the following limitations:

18 [T]he claimant can occasionally lift and carry up to 20 pounds and
19 frequently lift and carry up to 10 pounds. He can stand and walk for up
20 to 6 hours in an 8-hour day, and sit for 6 hours in an 8-hour day. No
21 more than occasional crawling and no climbing of ladders, ropes, or
22 scaffolds; avoid concentrated exposure to industrial vibration; no
23 exposure to unprotected heights or dangerous moving machinery; no
24 commercial driving; no more than lower semiskilled (SVP-3) tasks; no
25 more than brief superficial interaction with the general public; and no
cooperative teamwork endeavors with coworkers.

26 Tr. 24-25. The ALJ identified Plaintiff’s past relevant work as heating and air
27 conditioning helper, laborer, and kitchen helper and concluded that Plaintiff was
28 not able to perform this past relevant work. Tr. 29.

1 At step five, the ALJ determined that, considering Plaintiff's age, education,
2 work experience and residual functional capacity, and based on the testimony of
3 the vocational expert, there were other jobs that exist in significant numbers in the
4 national economy Plaintiff could perform, including the jobs of office cleaner I,
5 electrical assembler, and production assembler. Tr. 30. The ALJ thus concluded
6 Plaintiff was not under a disability within the meaning of the Social Security Act at
7 any time from June 30, 2010 through the date of the ALJ's decision, May 4, 2015.
8 *Id.*

9 ISSUES

10 The question presented is whether substantial evidence supports the ALJ's
11 decision denying benefits and, if so, whether that decision is based on proper legal
12 standards. Plaintiff contends the ALJ erred by (1) failing to properly consider
13 Plaintiff's symptom statements and (2) failing to properly weigh the medical
14 source opinions in the record.

15 DISCUSSION

16 A. Plaintiff's Symptom Statements

17 Plaintiff contests the ALJ's determination that his reported symptoms were
18 less than fully credible. ECF No. 15 at 12-14.

19 It is generally the province of the ALJ to make credibility determinations,
20 *Andrews*, 53 F.3d at 1039, but the ALJ's findings must be supported by specific
21 cogent reasons, *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent
22 affirmative evidence of malingering, the ALJ's reasons for rejecting the claimant's
23 testimony must be "specific, clear and convincing." *Smolen v. Chater*, 80 F.3d
24 1273, 1281 (9th Cir. 1996); *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995).
25 "General findings are insufficient: rather the ALJ must identify what testimony is
26 not credible and what evidence undermines the claimant's complaints." *Lester*, 81
27 F.3d at 834.

28 The ALJ found Plaintiff less than fully credible concerning the intensity,

1 persistence, and limiting effects of his reported symptoms. Tr. 25. The ALJ
2 reasoned that Plaintiff was less than fully credible because (1) the objective
3 medical evidence did not establish total disability or corroborate the degree of
4 symptomatology and limitation alleged, (2) Plaintiff inconsistently reported his
5 drug and alcohol sobriety dates, and (3) Plaintiff's reported activities of daily
6 living were not supportive of his allegations of total disability. Tr. 28.

7 **1. Objective Medical Evidence**

8 The ALJ's first reason for finding Plaintiff less than fully credible, that
9 Plaintiff's symptoms are not supported by objective medical evidence, fails to meet
10 the specific, clear, and convincing standard.

11 Objective medical evidence is a "relevant factor in determining the severity
12 of the claimant's pain and its disabling effects." *Rollins v. Massanari*, 261 F.3d
13 853, 857 (9th Cir. 2001). Here the ALJ made the assertion that Plaintiff's
14 statements were inconsistent with the objective evidence, but failed to address any
15 specifics found in the record. Tr. 28. This is insufficient under the Ninth Circuit's
16 holding in *Lester*. 81 F.3d at 834 ("General findings are insufficient: rather the
17 ALJ must identify what testimony is not credible and what evidence undermines
18 the claimant's complaints."). Defendant asserts that the ALJ met the specificity
19 required by the Court in *Lester* through her earlier discussion of Plaintiff's
20 subjective complaints juxtaposed with the summary of the medical evidence. ECF
21 No. 19 at 5. However, the ALJ is required to do more than a mere summary, she
22 must draw some association between the evidence and the testimony to satisfy the
23 requirements of the holding in *Lester*.

24 Next, Defendant's briefing provides specific aspects of the evidence,
25 improvement with treatment, absence of treatment for three years, and evidence of
26 conservative treatment, as support for the ALJ's determination. ECF No. 19 at 5.
27 However, the Court is limited to reviewing what the ALJ provided in her decision
28 and the ALJ failed to name these as specific rationale in support of her

determination. As such, Defendant's assertion is a *post hoc* rationalization, which will not be considered by this Court. *See Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007) (The Court will "review only the reasons provided by the ALJ in the disability determination and may not affirm the ALJ on a ground upon which [she] did not rely."). As such, this reason fails to meet the specific, clear and convincing standard.

2. Drug and Alcohol Use

The ALJ found that inconsistencies in the record "[h]ave diminished the weight that can be accorded to the claimant's subjective allegations regarding symptoms and limitations that he has alleged in conjunction with his claims for state DSHS disability benefits and Social Security disability benefits." Tr. 28. The ALJ then supported this assertion by referencing Plaintiff's statements regarding his abstinence from drugs and alcohol, stating:

A report of DSHS psychological evaluation conducted by Gregory Charboneau on April 25, 2014, reflects the claimant's assertion that he had not engaged in methamphetamine or alcohol abuse since August 2011 (9F/3). Earlier reports of DSHS psychological examination conducted by Dr. Charboneau reflect the claimant's assertions on April 26, 2011 and July 27, 2011, that he had not abused methamphetamine since January 2011. By contrast, the claimant admitted to a neuropsychologist on April 14, 2012, that he had only been clean and sober for nine months (3F/2), i.e., since approximately August 2012 (see also 4F/23), which suggests that the claimant was actually still engaging in substance abuse at the time of both Dr. Charboneau's evaluations in 2011.

Tr. 28.

An ALJ may properly consider evidence of a claimant's substance use in assessing credibility. *Thomas v. Barnhart*, 278 F.3d 947, 959 (9th Cir. 2002) (ALJ's finding that claimant was not a reliable historian regarding drug and alcohol usage supports negative credibility determination); *Verduzco v. Apfel*, 188

1 F.3d 1087, 1090 (9th Cir. 1999) (conflicting or inconsistent testimony concerning
2 alcohol or drug use can contribute to an adverse credibility finding).

3 Plaintiff asserts in his initial briefing that these statements are not
4 inconsistent, but reflect relapses. ECF No. 15 at 13. A review of the record shows
5 that the ALJ misstated the dates of Dr. Charboneau's evaluations, and Plaintiff did
6 not demonstrate any inconsistencies in reporting his substance usage to providers,
7 but consistently reported relapses in meth usage in January and July of 2011 and a
8 relapse in alcohol usage in August of 2011. On December 20, 2010, Plaintiff had a
9 positive drug screen for meth. Tr. 213. On April 15, 2011, Plaintiff admitted to
10 Dr. Charboneau that his last meth use was in January of 2011. Tr. 249. On April
11 26, 2011, Plaintiff reported using meth in January of 2011. Tr. 231. On July 5,
12 2011, Plaintiff again reported to Dr. Charboneau that his last meth use was in
13 January of 2011. Tr. 240. On February 9, 2012, Plaintiff reported to Melissa
14 Russel, PA-C that he has been in recovery from meth and alcohol for seven
15 months. Tr. 280. On April 14, 2012, Plaintiff told Dr. Chong that his last inpatient
16 treatment program began in August of 2011 and that he had remained abstinent
17 from alcohol and drug use for the past nine months. Tr. 253. On November 17,
18 2012, Plaintiff reported that his last meth use was July 22, 2011 and his last alcohol
19 use was August 12, 2011. Tr. 493. On May 22, 2014, June 30, 2014, and August
20 28, 2014, Plaintiff reported that his last meth use was July of 2011 and last alcohol
21 use was August of 2011. Tr. 366, 373, 384. On April 25, 2014, Plaintiff told Dr.
22 Charboneau that his last use of methamphetamine was July 22, 2011 and his last
23 use of alcohol and marijuana was August of 2011. Tr. 355.

24 The ALJ cited Dr. Charboneau's evaluations as occurring on July 27, 2011
25 and August 29, 2011. Tr. 28. However, these were the dates the evaluations were
26 signed. The evaluations actually took place on April 15, 2011 and July 5, 2011,
27 Tr. 242, 251, which makes a relapse of multiple substances in July and August of
28 2011 not inconsistent with Plaintiff's reports to Dr. Charboneau.

1 The Court notes that Plaintiff's hearing testimony was inconsistent regarding
2 the date of his last meth use. Plaintiff stated he last used meth on August 12, 2011.
3 Tr. 54. However, the ALJ did not rely on the hearing testimony when finding
4 Plaintiff's reports of drug usage as inconsistent. Tr. 28. Therefore, the Court
5 cannot rely on this as a reason to uphold the ALJ's credibility determination, *See*
6 *Orn*, 495 F.3d at 630, and the ALJ's reason fails to meet the specific, clear and
7 convincing standard.

8 **3. Activities of Dailey Living**

9 The ALJ's third reason for finding Plaintiff less than fully credible, that
10 Plaintiff's activities cast doubt on his alleged limitations, fails to meet the specific,
11 clear and convincing standard.

12 A claimant's daily activities may support an adverse credibility finding if (1)
13 the claimant's activities contradict his other testimony, or (2) "the claimant is able
14 to spend a substantial part of his day engaged in pursuits involving performance of
15 physical functions that are transferable to a work setting." *Orn*, 495 F.3d at 639
16 (citing *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)). "The ALJ must make
17 'specific findings relating to [the daily] activities' and their transferability to
18 conclude that a claimant's daily activities warrant an adverse credibility
19 determination." *Id.* (quoting *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir.
20 2005)). A claimant need not be "utterly incapacitated" to be eligible for benefits.
21 *Fair*, 885 F.2d at 603.

22 The ALJ found that Plaintiff's activities "have not been supportive of his
23 allegation of total disability, as defined by the Social Security Act. The claimant
24 testified that he uses public transportation and that the record reflects that he has a
25 girlfriend and that they attended a Halloween Party in October 2014." Tr. 28.
26 Again, the ALJ failed to provide any association between Plaintiff's activities and
27 their assumed inconsistency with his other allegations. Without more, this reason
28 falls short of the specific, clear and convincing standard.

1 In conclusion, the ALJ failed to provide a legally sufficient reason for
2 finding Plaintiff's symptom statements less than fully credible. Therefore, this
3 case is remanded for the ALJ to readdress Plaintiff's statements on remand.

4 **B. Evaluation of Medical Evidence**

5 Plaintiff argues that the ALJ failed to properly consider and weigh the
6 medical opinion expressed by examining physician Gregory Charboneau, Ed.D.
7 ECF No. 15 at 14-17.

8 In weighing medical source opinions, the ALJ should distinguish between
9 three different types of physicians: (1) treating physicians, who actually treat the
10 claimant; (2) examining physicians, who examine but do not treat the claimant; and
11 (3) nonexamining physicians who neither treat nor examine the claimant. *Lester*,
12 81 F.3d at 830. The ALJ should give more weight to the opinion of a treating
13 physician than to the opinion of an examining physician. *Orn*, 495 F.3d at 631.
14 Likewise, the ALJ should give more weight to the opinion of an examining
15 physician than to the opinion of a nonexamining physician. *Id.*

16 When an examining physician's opinion is not contradicted by another
17 physician, the ALJ may reject the opinion only for "clear and convincing" reasons,
18 and when an examining physician's opinion is contradicted by another physician,
19 the ALJ is only required to provide "specific and legitimate reasons" to reject the
20 opinion. *Lester*, 81 F.3d at 830-31. The specific and legitimate standard can be
21 met by the ALJ setting out a detailed and thorough summary of the facts and
22 conflicting clinical evidence, stating her interpretation thereof, and making
23 findings. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). The ALJ is
24 required to do more than offer her conclusions, she "must set forth [her]
25 interpretations and explain why they, rather than the doctors', are correct."
26 *Embrey v. Bowen*, 849 F.2d 418, 421-422 (9th Cir. 1988).

27 Dr. Charboneau first evaluated Plaintiff on April 15, 2011 Tr. 247-51. He
28 opined that Plaintiff had a marked limitation in seven of the eight abilities of

1 mental functioning addressed on the form and one moderate limitation. Tr. 249-
2 50. Dr. Charboneau completed a second evaluation on April 26, 2011. Tr. 229-33.
3 He opined that Plaintiff had a severe limitation in four mental functional abilities
4 and a marked limitation in the remaining four abilities addressed on the form. Tr.
5 231-32. He evaluated Plaintiff again on July 5, 2011 and opined that Plaintiff
6 continued to have a severe impairment in the same four abilities of mental
7 functioning, but had improved to the point one of the marked limitations was
8 reduced to moderate. Tr. 240-41. He performed a fourth evaluation on April 25,
9 2014. Tr. 354-58. In this evaluation he addressed thirteen mental functional
10 abilities opining that Plaintiff had one moderate limitation, three marked
11 limitations, and nine severe limitations. Tr. 356.

12 The ALJ gave no significant weight to the opinions of Dr. Charboneau,
13 because (1) he did not have access to the entire record, (2) he based his opinion on
14 Plaintiff's unreliable symptom statements, (3) he never questioned whether
15 Plaintiff had been exaggerating his symptoms due to secondary gain and (4) he
16 never attempted to verify Plaintiff's reported sobriety dates. Tr. 28. Additionally,
17 the ALJ found the following regarding Dr. Charboneau's three 2011 evaluations:

18 All three of Dr. Charboneau's exams include large blocks of text,
19 worded exactly the same, suggesting that Dr. Charboneau did not
20 engage in independent evaluations each time but instead copied and
21 pasted the claimant's allegations and his analysis from each form to the
22 next. This dramatically lessens the veracity of Dr. Charboneau's
23 observations, findings, and diagnoses. It is simply not credible that the
24 claimant repeated, word for word, his symptoms over an eight-month
25 period.

26 Tr. 26.

27 Plaintiff asserts that Dr. Charboneau's opinions are uncontested and the ALJ
28 was required to provide clear and convincing reasons for discounting them. ECF

1 No. 15 at 17. Defendant argues that Dr. Charboneau's opinions were contradicted
2 by the opinion of Jason Chong, Psy.D. and only specific and legitimate reasons are
3 necessary. ECF No. 19 at 11.

4 Dr. Chong provided the following opinion regarding Plaintiff's ability to
5 work:

6 Cognitively, Mr. Baugh is quite capable of performing many types of
7 jobs duties with no identified limitations based on cognitive testing. He
8 is able to attend to and follow complex instructions without difficulty.
9 His memory is average and above. He would benefit from being in a
10 job setting or environment in which he could be provided with some
11 structure and organization, a routine to follow and a patient and
12 understanding supervisor. Most importantly, given Mr. Baugh's
13 anxiety and tendency to become easily frustrated and irritable, he would
14 likely do better working in an environment that does not require a
15 significant amount of interpersonal interaction. I believe Mr. Baugh is
16 capable of competitive employment if his mood and anxiety are
17 effectively treated. Finally, Mr. Baugh reports some changes in his
18 vision that negatively affect[s] his ability to read. I would suggest that
19 he follow-up with an optometrist for treatment. In the meantime, he
20 would benefit from a job placement/position that does not require heavy
21 amounts of reading.

22 Tr. 256-57. Despite Plaintiff's assertions otherwise, Dr. Chong's opinion
23 contradicts the opinions of Dr. Charboneau. Dr. Charboneau repeatedly held that
24 Plaintiff had marked limitations in understanding, remember, and persisting in
25 tasks by following complex instructions. Tr. 231, 240, 249, 356. This is in direct
26 conflict with Dr. Chong's opinion that Plaintiff "is able to attend to and follow
27 complex instructions without difficulty." Tr. 256. Therefore, the specific and
28 legitimate standard applies to the ALJ's reasons for discounting Dr. Charboneau's
29 opinions.

30 The ALJ's first reason, that Dr. Charboneau did not have access to the entire
31 record, does not meet the specific and legitimate standard. The ALJ failed to
32 explain why Dr. Charboneau's failure to review records discredits his opinions.

Tr. 28. Further, Dr. Charboneau interviewed and observed Plaintiff and repeatedly administered mental status examinations of Plaintiff. See Tr. 234-37, 243-46, 357-58. This is more than the Disability Determination Services medical consultants performed, and the ALJ provided significant weight to these opinions, who also did not have the entire record available for review. Tr. 29. Defendant cites to 20 C.F.R. §§ 404.1527(c), 416.927(c) as holding that the ALJ may consider the extent to which an acceptable medical source is familiar with the other information in the case record when assigning weight. ECF No. 19 at 12. However, it should not be a factor used against a provider when the other providers did not have access to the entire medical record either. The Court does not find any authority holding an examining physician's failure to supplement his own examination and observations with additional records is a specific and legitimate reason to give less weight to the opinions. See *Messee v. Colvin*, No. 2:16-CV-01259-DWC, 2017 WL 243355, at *6 (W.D. Wash. Jan. 20, 2017).

The ALJ's second reason, that he based his opinion on Plaintiff's unreliable symptom statements, does not meet the specific and legitimate standard. A doctor's opinion may be discounted if it relies on a claimant's unreliable self-report. *Bayliss v. Barnhart*, 427 F.3d 1211, 1217 (9th Cir. 2005); *Tommasetti*, 533 F.3d at 1041. Here, the ALJ failed to provide legally sufficient reasons for her determination that Plaintiff's statements were unreliable. See *supra*.

The ALJ's third reason, that he never questioned whether Plaintiff had been exaggerating his symptoms due to secondary gain, is not supported by substantial evidence. The ALJ was accurate that these evaluations were performed for the purpose of qualifying for public benefits. However, making the leap from this fact to the assumption that Plaintiff was misrepresenting himself for the purpose of receiving benefits is unfounded without some evidence of malingering. See *Burrell v. Colvin*, 775 F.3d 1133, 1139-40 (9th Cir. 2014) (the record does not support a finding of secondary gain without an affirmative finding that the

1 claimant was exaggerating or malingering.). The Court acknowledges that the ALJ
2 found Plaintiff's symptom complaints less than fully credible, but the ALJ failed to
3 provide legally sufficient reasons to support this determination. *See supra*. Even if
4 the ALJ had, finding a person unreliable as to the intensity, persistence, and
5 limiting effects of reported symptoms does not automatically equate to that person
6 being a malingerer or purposefully misrepresenting symptoms for an alternative
7 motive. *See S.S.R. 16-3p* ("the subjective symptom evaluation is not an
8 examination of an individual's character.").¹ Here, the ALJ's determination is not
9 supported by substantial evidence.

10 The ALJ's fourth reason, that he never attempted to verify Plaintiff's
11 reported sobriety dates, does not meet the specific and legitimate standard. As
12 addressed above, the ALJ's conclusion that Plaintiff was not sober during Dr.
13 Charboneau's 2011 evaluations is not supported by substantial evidence.

14 The ALJ's fifth reason, that three of Dr. Charboneau's evaluations contained
15 identical blocks of text, went unchallenged by Plaintiff. Therefore, this Court will
16 not address this reason in detail. *See Carmickle*, 533 F.3d at 1161 n.2.

17 In conclusion, the reasons challenged by Plaintiff failed to meet specific and
18 legitimate standard. The final reason for discounting Dr. Charboneau's opinions
19 went unaddressed. Since the case is being remanded for the ALJ to properly
20 consider Plaintiff's symptom statements, the ALJ is further instructed to address
21 these evaluations anew on remand.

22
23
24 ¹The Court acknowledges that this S.S.R. was not in effect at the time of the
25 ALJ's 2015 decision. However, this S.S.R. was promulgated to more accurately
26 reflect regulations that never used the term credibility. Therefore, the Court relies
27 on the S.S.R. for the purpose of establishing the meaning of terms and the
28 underlying goals of the agency.

REMEDY

The decision whether to remand for further proceedings or reverse and award benefits is within the discretion of the district court. *McAllister v. Sullivan*, 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate where “no useful purpose would be served by further administrative proceedings, or where the record has been thoroughly developed,” *Varney v. Secretary of Health & Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused by remand would be “unduly burdensome,” *Terry v. Sullivan*, 903 F.2d 1273, 1280 (9th Cir. 1990). *See also Garrison v. Colvin*, 759 F.3d 995, 1021 (9th Cir. 2014) (noting that a district court may abuse its discretion not to remand for benefits when all of these conditions are met). This policy is based on the “need to expedite disability claims.” *Varney*, 859 F.2d at 1401. But where there are outstanding issues that must be resolved before a determination can be made, and it is not clear from the record that the ALJ would be required to find a claimant disabled if all the evidence were properly evaluated, remand is appropriate. *See Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*, 211 F.3d 1172, 1179-80 (9th Cir. 2000).

In this case, it is not clear from the record that the ALJ would be required to find Plaintiff disabled if all the evidence were properly evaluated. Further proceedings are necessary for the ALJ to determine the reliability of Plaintiff’s symptom statements and address Dr. Charboneau’s opinion in light of the correct evaluation dates. The ALJ will also need to supplement the record with any outstanding medical evidence and call a medical and a vocational expert to testify at any remand proceedings.

CONCLUSION

Accordingly, **IT IS ORDERED:**

1. Defendant’s Motion for Summary Judgment, **ECF No. 19**, is **DENIED**.

1 2. Plaintiff's Motion for Summary Judgment, **ECF No. 15**, is
2 **GRANTED, in part**, and the matter is **REMANDED** to the Commissioner for
3 additional proceedings consistent with this Order.

4 3. Application for attorney fees may be filed by separate motion.

5 The District Court Executive is directed to file this Order and provide a copy
6 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Plaintiff**
7 and the file shall be **CLOSED**.

8 DATED November 30, 2017.

A handwritten signature in black ink, appearing to be "M" or "Rodgers", is written above the judge's name.

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE